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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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LAUSTEVEION JOHNSON,

Plaintiff,

Case No. 3:12-cv-00538-MMD-WGC

Consolidated with 3:14-cv-00213-RCJ-WGC

v.

A. NGUYEN, et. al.,

Defendants.

**REPORT & RECOMMENDATION OF
U.S. MAGISTRATE JUDGE**

12 This Report and Recommendation is made to the Honorable Miranda M. Du, United
13 States District Judge. The action was referred to the undersigned Magistrate Judge pursuant to
14 28 U.S.C. § 636(b)(1)(B) and the Local Rules of Practice, LR 1B 1-4. Before the court is
15 Defendants' Motion for Summary Judgment. (ECF No. 131.) Plaintiff filed a response (ECF No.
16 139) and Defendants filed a reply (ECF No. 140).

17 After a thorough review, the court recommends that Defendants' motion be granted in
18 part and denied in part.

I. BACKGROUND

20 This action and case 3:14-cv-213-RCJ-WGC were consolidated, with 3:12-cv-00538-
21 MMD-WGC becoming the lead case number. (ECF No. 125.) The parties filed cross-motions for
22 summary judgment in 3:14-cv-00213-RCJ-WGC prior to consolidation, and those motions were
23 addressed in a separate report and recommendation that is currently pending before District
24 Judge Du. (*See* ECF No. 138.) The court now addresses Defendants' dispositive motion filed in
25 3:12-cv-00538-MMD-WGC.

26 Plaintiff is an inmate in custody of the Nevada Department of Corrections (NDOC). The
27 events giving rise to this action took place while Plaintiff was housed at Ely State Prison (ESP)
28 and High Desert State Prison (HDSP).

1 **A. Original Complaint**

2 Plaintiff filed his initial pro se civil rights complaint in October 2012 (ECF No. 1-1),
 3 along with a motion for leave to file an amended complaint stating that he had filed his
 4 complaint in state court and wished to “federalize” it and add allegations and defendants. (ECF
 5 Nos. 1-3, 4). The court granted the motion for leave to amend, and gave Plaintiff thirty days to
 6 file an amended complaint, or the court would screen the original complaint. (ECF No. 3.)
 7 Plaintiff did not file an amended complaint; therefore, the court screened and filed the original
 8 complaint. (Screening Order, ECF No. 6; Compl., ECF No. 7).

9 The original complaint named the following defendants: Isidro Baca, Renee Baker,
 10 R. Bannister, Lt. Bean, Eric Burson, Mike Byrne, G. Carpenter, Greg Cox, G. Holliday, John
 11 Keast, Dr. Koehn, Cole Morrow, Jennifer Nash, Dwight Neven, A. Nguyen, Rivos (later referred
 12 to as Dr. Rivas), and John Does 1-6. (ECF No. 7 at 2.) The court concluded Plaintiff could
 13 proceed with the following claims: (1) Eighth Amendment conditions of confinement against
 14 Baker, Dr. Koehn, and Dr. Rivas; (2) Eighth Amendment excessive force against Nguyen and
 15 Holliday; (3) Eighth Amendment deliberate indifference to a serious medical need against
 16 Holliday, Baker, Dr. Koehn, and Dr. Rivas; (4) Eighth Amendment supervisory liability against
 17 Nash, Baca, Keast, and Carpenter; (5) retaliation against Nguyen and Holliday; (6) equal
 18 protection against Nguyen and Holliday; (7) Fourteenth Amendment due process against Neven,
 19 Morrow, Bean, and Burson . (ECF No. 6 at 5-13.) The screening order dismissed Cox, Byrne and
 20 Bannister entirely, finding that Plaintiff set forth no allegations against those defendants. (*Id.*)

21 **B. Defendants’ Initial Motion to Dismiss/Motion for Summary Judgment**

22 Defendants filed a motion to dismiss/motion for summary judgment, arguing that many
 23 of Plaintiff’s claims were barred by a prior settlement agreement, and that he did not exhaust his
 24 administrative remedies with respect to other claims. (ECF No. 28.) The undersigned
 25 recommended that the motion be granted in part and denied in part, and this was adopted by
 26 District Judge Du. (ECF Nos. 92, 95.)

27 As a result, the following claims remained in the original complaint: (1) the Eighth
 28 Amendment excessive force claim against Holliday; (2) the retaliation claim against Holliday;

1 (3) the equal protection claim against Holliday; (3) the Eighth Amendment deliberate
 2 indifference to serious medical needs claim against Holliday; (4) the Eighth Amendment
 3 deliberate indifference to serious medical needs claim against Baker, Dr. Koehn and Dr. Rivas,
 4 as well as the Eighth Amendment conditions of confinement claim against these defendants; and
 5 (5) the supervisory liability claims against Nash, Baca, Keast and Carpenter, to the extent based
 6 on the above-referenced claims.

7 **C. Plaintiff's Motion for Leave to Amend**

8 Plaintiff filed a motion for leave to amend and proposed amended complaint on
 9 July 24, 2015. (ECF No. 107, 107-1.) The proposed amended complaint by and large omitted the
 10 allegations that were dismissed, except insofar as they included necessary background facts
 11 supporting the remaining claims. In addition, Plaintiff indicated that he knew the identity of the
 12 officers involved in the excessive force incidents previously alleged to be committed by Doe
 13 officers. The undersigned granted Plaintiff leave to amend the complaint to substitute defendants
 14 Collette, Hageman¹ and Osbun for the Doe defendants previously named in connection with the
 15 second alleged excessive force incident on January 1, 2012. (ECF No. 115 at 7.) Plaintiff was
 16 also given leave to substitute defendant Sevier in for the Doe defendant previously named as
 17 having witnessed defendant Holliday allegedly beat Plaintiff without intervening, and in failing
 18 to provide Plaintiff with medical care after this event. (ECF No. 115 at 7-8.) The court clarified
 19 that although the amended complaint referenced Nguyen and Cox, those defendants would
 20 remain dismissed from the action. (ECF No. 115 at 8.) The court also confirmed Plaintiff could
 21 not amend his allegations as to defendant Morrow. (*Id.*) The amended complaint was filed on
 22 August 25, 2015. (ECF No. 116.)

23 The undersigned's order on Plaintiff's motion for leave to amend erroneously stated that
 24 the Fourteenth Amendment due process claims against Neven, Morrow, Bean and Burson would
 25 proceed, when in fact these claims had been dismissed. (*See* ECF No. 115 at 3:18-19, ECF No.
 26 92 at 27.)

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28 ¹ Erroneously identified by Plaintiff as Hagena.

1 **D. Status of Claims and Defendants At this Juncture**

2 Because the parties' briefs have raised some question as to the status of the claims and
 3 parties at this juncture, the court will now address the allegations of the amended complaint and
 4 the parties implicated.

5 **1. Claims**

6 **a. Excessive Force Against Collette, Hageman and Osbun**

7 Plaintiff alleges that after an incident of excessive force involving Correctional Officer
 8 Nguyen on January 1, 2012 (described in the original complaint and subsequently dismissed), at
 9 approximately 3:18 p.m., Plaintiff ran away from Nguyen and when he felt he was a sufficient
 10 distance away from Nguyen, he voluntarily got down on the ground. (ECF No. 116 at 4, 6.) At
 11 that point, he claims that Collette, Hageman, and Osbun approached him and repeatedly shoved
 12 their knees into his back, and proceeded to drag him across the blacktop for approximately
 13 fifteen minutes, and then slammed him into the medical cart, causing injuries to his back. (ECF
 14 No. 116 at 4, 6.) Plaintiff avers that Nash, Neven, and Carpenter violated the Eighth Amendment
 15 by denying Plaintiff's grievances on this issue. (ECF No. 116 at 6.)

16 Based on these allegations, Plaintiff states a colorable Eighth Amendment claim of
 17 excessive force against Collette, Hageman, and Osbun. The supervisory liability allegations will
 18 be addressed, *infra*.

19 **b. Retaliation Claim Against Holliday**

20 Plaintiff goes on to allege that at approximately 3:20 p.m. on January 1, 2012, while
 21 Plaintiff was handcuffed and lay on the ground, Holliday threatened Plaintiff after he learned that
 22 Nguyen had assaulted Plaintiff for requesting a grievance, by stating: "They should of killed yo'
 23 ass! Next time you get a grievance I'm gone kill yo' ass! Yeah we gone kill you ass!!!" (ECF
 24 No. 116 at 4-5, 11.)

25 Plaintiff states a colorable retaliation claim against Holliday based on these allegations.

26 **c. Eighth Amendment Excessive Force and Denial of Medical Care Against
 27 Holliday and Sevier**

1 Next, Plaintiff alleges that at approximately 6:45 p.m. on January 1, 2012, Holliday and
 2 Sevier escorted Plaintiff from the HDSP infirmary, where he was receiving treatment due to the
 3 aforementioned assaults, to the segregation unit. He avers that Holliday ordered Plaintiff into the
 4 cell, and began to violently punch Plaintiff in his jaw multiple times while Plaintiff was
 5 handcuffed behind his back, causing Plaintiff to fall to the ground. Plaintiff suffered dizziness, a
 6 bloody mouth, three loose teeth, and felt as if his jaw was broken. He alleges that Sevier stood by
 7 and failed to intervene. (ECF No. 116 at 5, 6, 7.)

8 Plaintiff states a colorable Eighth Amendment excessive force claim against Holliday and
 9 Sevier based on these allegations.

10 Plaintiff also alleges that Sevier and Holliday refused Plaintiff's requests for medical
 11 treatment following this incident, with Holliday telling him: "No! I bet you' ass won't file
 12 another grievance." (ECF No. 116 at 5, 7, 11.)

13 Plaintiff states a colorable Eighth Amendment claim for deliberate indifference to a
 14 serious medical need against Holliday and Sevier based on these allegations.

15 **d. Eighth Amendment Medical Care and Conditions Deliberate Indifference**

16 Plaintiff then alleges that Warden Baker, Dr. Koehn, and Dr. Rivas were deliberately
 17 indifferent when they denied Plaintiff a walking cane after he suffered these injuries because
 18 ESP has a "no cane" policy, even though they knew he had fallen down many times since
 19 January 1, 2012, which has caused further injury to his knees. (ECF No. 116 at 7-8.)²

20 Plaintiff states a colorable Eighth Amendment claim for deliberate indifference to a
 21 serious medical need against Warden Baker, Dr. Koehn and Dr. Rivas based on these allegations.

22 Plaintiff also claims that Warden Baker, Dr. Koehn and Dr. Rivas were deliberately
 23 indifferent in denying him a cane in violation of the Eighth Amendment because as a result of
 24 that denial, Plaintiff has not been able to exercise or take a shower, and was forced to use the
 25 water in his toilet to wash. (ECF NO. 116 at 8.)

27 ² This is duplicative of his claim asserted in 3:14-cv-00213-RCJ-WGC, against Baker, Dr. Koehn and Cox
 28 (as well as Dr. Rivas, who was dismissed pursuant to Federal Rule of Civil Procedure 4m). As will be discussed,
infra, the undersigned has recommended that summary judgment be granted in Defendants' favor as to this claim in
 3:14-cv-00213-RCJ-WGC. (ECF No. 138.) Plaintiff did not file an objection to this recommendation.

1 Plaintiff states a colorable Eighth Amendment conditions of confinement claim against
 2 Warden Baker, Dr. Koehn and Dr. Rivas based on these allegations.

3 **e. Neven and Morrow and Plaintiff's Psychological Issues**

4 Plaintiff then avers that Neven and Morrow violated the Eighth Amendment when they
 5 knew of Plaintiff's history of psychological issues, but allowed Plaintiff to be found guilty of a
 6 notice of charges where he was sentenced to eighteen months in lockdown at ESP, which he
 7 claims exacerbated his mental health issues. (ECF No. 116 at 8.)

8 The court did not specifically comment on this allegation in screening the original or
 9 amended complaint. Neven and Morrow were at HDSP, and Plaintiff alleges that they approved
 10 the decision to sentence him to eighteen months in disciplinary segregation at ESP, a maximum
 11 security facility. Plaintiff goes on to allege that while at ESP he was subjected to inmates who
 12 yelled and kicked their doors and threatened to harm him, which he claims exacerbated his
 13 mental health issues. Neven and Morrow, who were employed at HDSP and not ESP, could not
 14 have known of the specific conditions Plaintiff would allegedly face at ESP, or that they would
 15 exacerbate his mental health symptoms, as Plaintiff alleges. Therefore, any error in failing to
 16 specifically discuss these allegations is harmless because the allegations do not state a colorable
 17 claim for relief against Neven and Morrow. The Eighth Amendment claim that Neven and
 18 Morrow exacerbated Plaintiff's mental health condition should be dismissed with prejudice.

19 **f. Neven, Morrow, Bean and Burson and Due Process**

20 Plaintiff alleges that Neven, Morrow, Bean and Burson knew Plaintiff was innocent of
 21 the charges, but found him guilty anyway. (ECF No. 116 at 8.)

22 These allegations of a due process violation by these defendants were dismissed in
 23 connection with the initial motion to dismiss/motion for summary judgment, and it was
 24 confirmed in the order granting Plaintiff leave to amend that this claim would not proceed in the
 25 amended complaint.

26 **g. Baker, Byrne, Neven, Nash and Baca-Denial of Transfer to Another Prison**

27 Plaintiff then claims he was denied his request to be sent to another prison by Baker,
 28 Byrne, Neven, Nash and Baca. (ECF No. 116 at 9.)

1 This allegation was not specifically addressed in the screening of the original or amended
 2 complaint, but again the error is harmless because Plaintiff does not state a cognizable claim for
 3 relief, as there is no right to be placed in any particular facility within a state's prison system. *See*
 4 *Meachum v. Fano*, 427 U.S. 215, 223-24 (1976).

5 **h. Baker, Nash, Carpenter, Neven, Baca, Cox, Morrow & One-on-One**
 6 **Mental Health Sessions**

7 Plaintiff avers that Baker, Nash, Carpenter, Neven, Baca, Cox and Morrow violated his
 8 Eighth Amendment rights when they denied his requests for one-on-one mental health sessions
 9 on the basis that the facility was short-staffed. (ECF No. 116 at 9.)

10 The screening order and order granting Plaintiff leave to amend his complaint did not
 11 specifically discuss this allegation.

12 First, the amended complaint does not address how denying a request for one-on-one
 13 counseling sessions rose to the level of deliberate indifference: that defendants knew of and
 14 disregarded an excessive risk to Plaintiff's health. *See Farmer v. Brennan*, 511 U.S. 825, 837
 15 (1994).

16 Second, Plaintiff's opposition to the motion for summary judgment before the court
 17 directly contradicts this allegation. The evidence Plaintiff submitted with his opposition reveals
 18 that when Plaintiff sent a kite on April 2, 2013, requesting psychiatric care and one-on-one
 19 counseling, he was advised that when he saw the psychologist he denied having mental health
 20 issues and was re-classified with no mental health classification. (ECF No. 139 at 187.) The
 21 responder advised him that he would nevertheless be scheduled to see the provider. (*Id.*) Records
 22 submitted by Defendants indicate Plaintiff was seen by the psychiatrist on March 13, 2012. (ECF
 23 No. 142-1 at 2.)

24 Plaintiff sent another kite on November 11, 2013, asking for one-on-one mental health
 25 sessions, and was again advised that he would be scheduled for a one-on-one session as soon as
 26 possible, in two to four weeks. (ECF No. 139 at 188.) It does not appear that any of these kites
 27 were directed to or responded by any of these defendants, and in any event, those who received
 28 his requests indicated he would be scheduled for one-on-one sessions. Therefore, it is

1 recommended that to the extent the amended complaint includes an Eighth Amendment claim
 2 against Baker, Nash, Carpenter, Neven, Baca, Cox and Morrow based on the allegation that they
 3 denied his requests for one-on-one counseling sessions, summary judgment should be granted in
 4 their favor.

5 **i. Supervisory Liability Against Neven, Cox, Nash, Baca, Keast and
 6 Carpenter**

7 Finally, the amended complaint, like the original complaint, contains a brief allegation
 8 that Neven and Cox created an atmosphere, custom and practice at HDSP which allowed
 9 Plaintiff to be assaulted on January 1, 2012. (ECF No. 116 at 9.) In an apparent effort to support
 10 this allegation, Plaintiff then mentions: an incident in April 18, 2010, where Correctional Officer
 11 J. Miller slammed his head inside a heavy metal cell door causing him injury; an incident in
 12 March 2010, where he was written up for participating in Ramadan; that on August 10, 2010,
 13 Correctional Officer Schaff promised to kill Plaintiff for being a Muslim; and the confiscation of
 14 his clock radio in 2011 by Correctional Starling, pursuant to an order by Nash. (*Id.*) He also
 15 avers that Neven created a policy of correctional officer brutality against inmates at HDSP,
 16 where officers would not report other officers; and that Cox was informed of this. (*Id.* at 9-10).
 17 The court will also address here the brief allegations of the amended complaint concerning
 18 liability of Nash, Baca, Keast and Carpenter.

19 "'Under section 1983, supervisory officials are not liable for actions of subordinates on
 20 any theory of vicarious liability.'" *Snow v. McDaniel*, 681 F.3d 978, 989 (9th Cir. 2012) (en
 21 banc) (quoting *Hansen v. Black*, 885 F.2d 642, 645-46 (9th Cir. 1989)). "A supervisor may be
 22 liable only if (1) he or she is personally involved in the constitutional deprivation, or (2) there is
 23 'a sufficient causal connection between the supervisor's wrongful conduct and the constitutional
 24 violation.'" *Id.* (quoting *Hansen*, 885 F.2d at 646).

25 The causal connection can include: "1) [the supervisor's] own culpable action or inaction
 26 in the training, supervision, or control of subordinates; 2) their acquiescence in the constitutional
 27 deprivation of which a complaint is made; or 3) conduct that showed a reckless or callous
 28 indifference to the rights of others." *Lemire v. Cal. Dep't of Corr.*, 726 F.3d 1062, 1085 (9th Cir.

1 2013) (citations and internal quotation marks omitted). "The requisite causal connection can be
 2 established by setting in motion a series of acts by others, or by knowingly refusing to terminate
 3 a series of acts by others, which the supervisor knew or should have known would cause others
 4 to inflict a constitutional injury." *Id.* (citing *Starr v. Baca*, 652 F.3d 1202, 1207-08 (9th Cir.
 5 2011), *cert. denied*, 132 S.Ct. 2101 (Apr. 30, 2012)) (internal quotation marks omitted).

6 In addition, "[s]upervisory liability exists even without overt personal participation in the
 7 offensive act if supervisory officials implement a policy so deficient that the policy 'itself is a
 8 repudiation of constitutional rights' and is 'the moving force of a constitutional violation.'" *Crowley v. Bannister*, 734 F.3d 967, 977 (9th Cir. 2013) (quoting *Hansen*, 885 F.2d at 646
 9 (internal quotation marks omitted)).
 10

11 While the screening order and the order granting Plaintiff leave to amend did not discuss
 12 the brief allegations against Neven and Cox in detail, neither the order screening the original
 13 complaint nor the order granting him leave to amend permitted Plaintiff to proceed with any
 14 claim against Neven or Cox based on these allegations. The court will expand on that conclusion
 15 now.

16 Essentially, Plaintiff alleges a supervisory liability claim against Cox and Neven to hold
 17 them responsible for the alleged assaults he endured on January 1, 2012, based on the averment
 18 that HDSP's Warden Neven created a custom of brutality against inmates, and that Cox was
 19 informed of this custom before Plaintiff was assaulted. (ECF No. 7 at 17.)

20 The threadbare allegations that Neven created an environment at HDSP that condoned
 21 violence and that Cox knew about it, without any *factual* allegations about how Neven did this,
 22 how Cox knew about it, and importantly, how this caused Plaintiff to be assaulted in January
 23 2012, are insufficient.

24 Plaintiff's references in the amended complaint to various incidents that occurred in 2010
 25 and 2011 involving other officers include no allegations that connect those incidents to Neven or
 26 Cox.
 27
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1 While a plaintiff would normally be given leave to amend to try to cure such deficiencies,
2 Plaintiff tried to assert this supervisory claim in the original complaint, but was not permitted to
3 proceed, and did not expand on his allegations in the amended complaint.

4 Moreover, Plaintiff addresses these allegations in his opposition to the motion for
5 summary judgment, and demonstrates that granting leave to amend at this juncture would be
6 futile.

7 To support the allegations against Neven and Cox, Plaintiff submitted the following with
8 his opposition to Defendants' dispositive motion: a vague citation to news stories in Nevada
9 regarding Nevada prisons leading the country in inmate shootings; a statement that Cox was
10 forced to resign in 2015 after an inmate was shot to death by HDSP guards for fighting; and 2011
11 letters from an organization called Nevada Cure that referenced a claim by a young ESP prisoner
12 of inhumane conditions and treatment, as well as a request by Nevada Cure to NDOC inmates
13 for information supporting a claim that NDOC prisoners were being subject to abuse. (ECF No.
14 139 at 70, 172-175.)

15 The evidence Plaintiff has submitted to support the claims against Neven and Cox is
16 simply too tenuous to establish any policy, custom or practice created by Neven at HDSP, or that
17 Cox had any knowledge about the alleged conditions at HDSP, and that this caused Plaintiff to
18 be assaulted in January 2012. The vague references to news stories about shootings at NDOC
19 and Cox's departure from NDOC in connection with a 2015 shooting are not enough to connect
20 Cox to Plaintiff's alleged assault in January 2012. The letters from Nevada Cure similarly fail to
21 establish any connection between Cox and Neven and the alleged incidents of excessive force in
22 January 2012. The letters simply reference claims of abusive conduct, but do nothing to
23 substantiate those claims. For these reasons, it is recommended that the supervisory liability
24 claims against Neven and Cox be dismissed with prejudice.

25 The court will now address the supervisory liability claims aimed at Nash, Baca, Keast
26 and Carpenter.

27 Insofar as the amended complaint predicates these defendants' liability on the denial of
28 grievances concerning an Eighth Amendment excessive force claim, the court concludes that this

1 cannot serve as a basis for supervisory liability under these circumstances. The responses of
2 Defendants to grievances concerning an alleged incident of excessive force could not have
3 contributed to the use of excessive force, as the alleged excessive force had already taken place,
4 meaning that the Defendants could not have personally participated in the violation. In addition,
5 the record is devoid of evidence that the Defendants played a role in their subordinates' training
6 that contributed to the underlying constitutional violation or implemented a policy that itself was
7 a repudiation of the Constitution.

8 To the extent Plaintiff's supervisory liability claim against Carpenter and Keast is based
9 on the allegation that they responded to grievances concerning Dr. Koehn's and Dr. Rivas' denial
10 of a request for a cane, the court concludes, *infra*, that summary judgment should be granted with
11 respect to the underlying Eighth Amendment claim. Moreover, Carpenter was employed as a
12 nurse (ECF No. 131 at 19), and did not exercise supervisory authority over Dr. Koehn or
13 Dr. Rivas. Therefore, there is no basis for supervisory liability against these defendants.

14 As a result, the supervisory liability claims against these defendants should be dismissed
15 with prejudice.

16 Notably, the amended complaint did not carry forward the equal protection claim against
17 Holliday from the original complaint.

18 **2. Defendants**

19 The court will now address the status of the parties at this juncture, keeping in mind the
20 preceding conclusion that the amended complaint only states colorable claims against the
21 following defendants: Collette, Hageman, Osbun, Holliday, Sevier, Baker, Dr. Koehn, and
22 Dr. Rivas.

23 The Office of the Attorney General accepted service of the amended complaint on behalf
24 of Baker, Collette, Holliday, Dr. Koehn, and Evander Rivas (as well as Baca, Carpenter, Keast,
25 and Nash, who the court has recommended should be dismissed). (ECF No. 117.) It did not
26 accept service on behalf of Sevier, as he is deceased. (ECF No. 117, ECF No. 117-1.) It also did
27 not accept service on behalf of Osbun or Hageman as they are former employees, but filed their
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1 last known addresses under seal. (ECF Nos. 117, 118.) To date, Plaintiff has not served Osbun,
2 Hageman, or Sevier's successor-in-interest.

3 The court recommends that Osbun and Hageman be dismissed from this action without
4 prejudice pursuant to Federal Rule of Civil Procedure 4(m).

5 Rule 25 of the Federal Rules of Civil Procedure, governing the substitution of parties,
6 provides in relevant part:

7 If a party dies and the claim is not extinguished, the court may order substitution
8 of the proper party. A motion for substitution may be made by any party or by the
9 decedent's successor or representative. If the motion is not made within 90 days
of service of a statement noting the death, the action by or against the decedent
must be dismissed.

10 Fed. R. Civ. P. 25(a)(1).

11 Defense counsel filed a notice of Sevier's death on September 8, 2015, which was served
12 on Plaintiff. (ECF No. 117.) It has been well over ninety days since this filing, and Plaintiff has
13 not filed a motion for substitution and service of Sevier's successor-in-interest or representative.
14 Accordingly, the court recommends that Sevier be dismissed with prejudice as a defendant to
15 this action.

16 Defendants' counsel points out that in becoming acquainted with this case in preparing to
17 brief this motion, it was discovered that the wrong defendant Rivas has been involved in this
18 case for some time. (ECF No. 131 at 5 n. 5.) Counsel points out that Evander Rivas, on whose
19 behalf service was accepted by the Attorney General, is a correctional officer at HDSP. (ECF
20 No. 131-10 at 9.) The defendant Rivas referred to in the pleadings was a physician at ESP.
21 Therefore, counsel requests that Evander Rivas be dismissed from the action. (*Id.*) Dr. David
22 Rivas no longer worked at ESP at the time the screening order issued. (*Id.*) Counsel states that
23 while the court may allow Plaintiff the opportunity to serve the correct defendant Rivas, the
24 Attorney General would not accept representation on his behalf unless contacted by him after he
25 was properly served. (*Id.*)

26 The court accepts counsel's representation that it accepted service on behalf of the wrong
27 defendant Rivas, and that Dr. David Rivas is no longer employed by ESP; therefore, the court
28 recommends that Evander Rivas be dismissed from this action with prejudice. As a result of the

1 court's finding, *infra*, that summary judgment should be granted in Defendants' favor with
 2 respect to the two claims in which Dr. Rivas is named, it is not necessary to grant Plaintiff leave
 3 to serve Dr. Rivas.

4 The court will now address Defendants' motion for summary judgment with respect to
 5 the remaining claims and defendants.

6 **II. LEGAL STANDARD**

7 "The purpose of summary judgment is to avoid unnecessary trials when there is no
 8 dispute as to the facts before the court." *Northwest Motorcycle Ass'n v. U.S. Dep't of Agric.*, 18
 9 F.3d 1468, 1471 (9th Cir. 1994) (citation omitted). In considering a motion for summary
 10 judgment, all reasonable inferences are drawn in favor of the non-moving party. *In re Slatkin*,
 11 525 F.3d 805, 810 (9th Cir. 2008) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255
 12 (1986)). "The court shall grant summary judgment if the movant shows that there is no genuine
 13 dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R.
 14 Civ. P. 56(a). On the other hand, where reasonable minds could differ on the material facts at
 15 issue, summary judgment is not appropriate. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,
 16 250 (1986).

17 A party asserting that a fact cannot be or is genuinely disputed must support the
 18 assertion by:

19 (A) citing to particular parts of materials in the record, including depositions,
 20 documents, electronically stored information, affidavits or declarations,
 21 stipulations (including those made for purposes of the motion only), admissions,
 22 interrogatory answers, or other materials; or

23 (B) showing that the materials cited do not establish the absence or presence of a
 24 genuine dispute, or that an adverse party cannot produce admissible evidence to
 25 support the fact.

26 Fed. R. Civ. P. 56(c)(1)(A), (B).

27 If a party relies on an affidavit or declaration to support or oppose a motion, it "must be
 28 made on personal knowledge, set out facts that would be admissible in evidence, and show that
 the affiant or declarant is competent to testify on the matters stated." Fed. R. Civ. P. 56(c)(4).

29 In evaluating whether or not summary judgment is appropriate, three steps are necessary:
 30 (1) determining whether a fact is material; (2) determining whether there is a genuine dispute as
 31 to a material fact; and (3) considering the evidence in light of the appropriate standard of proof.

1 See *Anderson*, 477 U.S. at 248-250. As to materiality, only disputes over facts that might affect
 2 the outcome of the suit under the governing law will properly preclude the entry of summary
 3 judgment; factual disputes which are irrelevant or unnecessary will not be considered. *Id.* at 248.

4 In deciding a motion for summary judgment, the court applies a burden-shifting analysis.
 5 "When the party moving for summary judgment would bear the burden of proof at trial, 'it must
 6 come forward with evidence which would entitle it to a directed verdict if the evidence went
 7 uncontroverted at trial.'...In such a case, the moving party has the initial burden of establishing
 8 the absence of a genuine [dispute] of fact on each issue material to its case." *C.A.R. Transp.*
 9 *Brokerage Co. v. Darden Rests., Inc.*, 213 F.3d 474, 480 (9th Cir. 2000) (internal citations
 10 omitted). In contrast, when the nonmoving party bears the burden of proving the claim or
 11 defense, the moving party can meet its burden in two ways: (1) by presenting evidence to negate
 12 an essential element of the nonmoving party's case; or (2) by demonstrating the nonmoving party
 13 failed to make a showing sufficient to establish an element essential to that party's case on which
 14 that party will bear the burden of proof at trial. See *Celotex Corp. v. Cartrett*, 477 U.S. 317, 323-
 15 25 (1986).

16 If the moving party satisfies its initial burden, the burden shifts to the opposing party to
 17 establish that a genuine dispute exists as to a material fact. See *Matsushita Elec. Indus. Co. v.*
 18 *Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). To establish the existence of a genuine dispute of
 19 material fact, the opposing party need not establish a genuine dispute of material fact
 20 conclusively in its favor. It is sufficient that "the claimed factual dispute be shown to require a
 21 jury or judge to resolve the parties' differing versions of the truth at trial." *T.W. Elec. Serv., Inc.*
 22 *v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987) (quotation marks and citation
 23 omitted). "Where the record taken as a whole could not lead a rational trier of fact to find for the
 24 non-moving party, there is no 'genuine issue for trial.'" *Matsushita Elec. Industrial Co. v. Zenith*
 25 *Radio Corp.*, 475 U.S. 574, 587 (1986) (citation omitted). The nonmoving party cannot avoid
 26 summary judgment by relying solely on conclusory allegations that are unsupported by factual
 27 data. *Id.* Instead, the opposition must go beyond the assertions and allegations of the pleadings

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1 and set forth specific facts by producing competent evidence that shows a genuine dispute of
 2 material fact for trial. *Celotex*, 477 U.S. at 324.

3 That being said,

4 [i]f a party fails to properly support an assertion of fact or fails to properly address
 5 another party's assertion of fact as required by Rule 56(c), the court may: (1) give
 6 an opportunity to properly support or address the fact; (2) consider the fact
 7 undisputed for purposes of the motion; (3) grant summary judgment if the motion
 8 and supporting materials—including the facts considered undisputed—show that
 9 the movant is entitled to it; or (4) issue any other appropriate order.

10 Fed. R. Civ. P. 56(e).

11 At summary judgment, the court's function is not to weigh the evidence and determine
 12 the truth but to determine whether there is a genuine dispute of material fact for trial. *See*
 13 *Anderson*, 477 U.S. at 249. While the evidence of the nonmovant is "to be believed, and all
 14 justifiable inferences are to be drawn in its favor," if the evidence of the nonmoving party is
 15 merely colorable or is not significantly probative, summary judgment may be granted. *Id.* at 249-
 16 50 (citations omitted).

III. DISCUSSION

A. Preliminary Matters

17 As Plaintiff has done in other filings in these consolidated cases, he asserts that he was
 18 not able to review all of his medical records. (See ECF No. 139 at 6, 61.) As the court
 19 commented in connection with the dispositive motion filed in case No. 3:14-cv-00213-MMD-
 20 WGC, Plaintiff is a seasoned pro se litigant who is well aware of NDOC's policy of kiting the
 21 warden to review medical records, and was specifically advised that he could review the records
 22 filed under seal by submitting a kite. (See ECF No. 138 at 7; ECF No. 130 at 3.)

23 In addition, he states that Exhibits J, K, L, and M to Defendants' motion are blacked out
 24 so that he could not review them. (ECF No. 139 at 61.) These exhibits contain NDOC employee
 25 listings, with the duty location and title of employees, and Defendants blocked out the names of
 26 employees who are not defendants to this action; therefore, there is no issue with the redaction.
 27 (See ECF Nos. 131-10, 131-11, 131-12, and 131-13.)

28 He also mentions, as he has in other filings, that he lacks legal knowledge and training
 and was not appointed counsel. As the court has previously advised Plaintiff, this is the

1 predicament of almost every pro se inmate litigant. The court has found Plaintiff does not meet
 2 the standard for appointment of counsel; therefore, he is tasked with doing his best under the
 3 circumstances. (ECF No. 40.) The court finds, as it has in the past, that Plaintiff has been able to
 4 sufficiently present his claims and arguments throughout this litigation.

5 **B. Eighth Amendment Excessive Force Against Collette**

6 Plaintiff contends that he was assaulted by Collette on January 1, 2012, at HDSP. He
 7 claims that after he lay down on the ground following the assault by Nguyen, Collette came up
 8 and started kneeing him in the lower back, and then he was dragged across the yard and slammed
 9 onto the medical cart, and suffered injuries including severe back pain. (ECF No. 116 at 4-5;
 10 ECF No. 139 at 7, 8, 62-63, 66.) He asserts that following this incident he was driven to the
 11 HDSP hospital and was given pain pills for the injuries caused by Collette. (ECF NO. 139 at 7, 8,
 12 67.)

13 Plaintiff contends that the officers used force maliciously and sadistically to cause him
 14 pain, and caused a severe lower back injury. (ECF No. 139 at 4, 5, 70.) He asserts that he did not
 15 disobey Nguyen or Collette's orders prior to being attacked, and instead he was not disorderly or
 16 resisting, but was on the ground being submissive. (ECF No. 139 at 8, 9, 61-62.)

17 A grievance dated January 1, 2012, reported the incident involving Nguyen, and
 18 mentioned that correctional officers jumped on his back and started violently shoving their knees
 19 into his back, threw him around, and then threw him onto the medical cart. (ECF No. 139 at 103-
 20 106.) Another grievance dated in April of 2012, mentioned that officers kneed him in the back on
 21 January 1, 2012, and that he suffered injuries. (ECF No. 139 at 111-114.)

22 According to Defendants, on January 1, 2012, Correctional Officer Nguyen had ordered
 23 Plaintiff to accompany him to the sally port, and Plaintiff refused and fled. (ECF No. 131 at 9-
 24 10; Ex. A, ECF No. 131-1.) The officers present were: Sergeant Giancola, Sergeant Ferber,
 25 Correctional Officers Palalay, Sevier, Ortiz, Nguyen, Osbun, Hageman, and Collette. (*Id.*) The
 26 incident was caught on video. (ECF No. 131 at 10; Ex. B (filed manually).) They maintain that
 27 during his flight, Plaintiff ran into Officer Collette, who was in the hallway outside of the unit.
 28 (ECF No. 131 at 14; Ex. A, ECF No. 131-1.) Collette ordered Plaintiff to get on the ground, but

1 he disregarded the order and ran from officers from the tier out to the yard. (*Id.*) Upon exiting the
 2 unit, Collette witnessed Hageman, Osbun and Nguyen restrain Plaintiff, and Collette proceeded
 3 to unit control to obtain leg restraints. (*Id.*)

4 Defendants go on to assert that medical staff arrived on the medical cart as Plaintiff was
 5 subdued on the ground. (*Id.*; Ex. C, ECF No. 134-1 at 17.) Plaintiff was then placed on the
 6 medical cart. (ECF No. 131 at 10.) Plaintiff was evaluated by medical. (ECF No. 131 at 10; Ex.
 7 C, ECF No. 134-1 at 17.) Medical noted no head injury, bleeding, or observable bruising,
 8 though there was possible back pain. (*Id.*; ECF No. 134-1 at 10, 17.) Plaintiff could ambulate
 9 without issue and was prescribed pain medication and was released. (ECF No. 131 at 10; Ex. C,
 10 ECF No. 134-1 at 9, 17.) On January 31, 2012, Plaintiff was evaluated by Dr. Aranas who noted
 11 Plaintiff had no complaints regarding his legs, no distress, good strength, and found no physical
 12 injuries. (ECF No. 131 at 10; Ex. C, ECF No. 134-1 at 9.)

13 Defendants claim that Plaintiff's allegation that Osbun, Hageman and Collette assaulted
 14 him is belied by the video.

15 Plaintiff states that he was not able to review the altercation between him and Nguyen
 16 and with Collette, as he was told the prison's video system was incompatible. (ECF No. 139 at 5,
 17 60.) He concedes he has seen the footage from the handheld camera, but states that this was
 18 taken after the Nguyen and Collette attacks, so it is not relevant. (ECF No. 139 at 60, 61.) He
 19 also contends that Defendants admit they discarded the relevant video footage captured by the
 20 yard's stationery cameras where Plaintiff was attacked by Collette. (ECF No. 139 at 5, 61.)

21 The Eighth Amendment prohibits the imposition of cruel and unusual punishment. U.S.
 22 Const. amend. VIII. It "embodies broad and idealistic concepts of dignity, civilized standards,
 23 humanity, and decency." *Estelle v. Gamble*, 429 U.S. 97, 102 (1976) (citation and internal
 24 quotations omitted). The "unnecessary and wanton infliction of pain...constitutes cruel and
 25 unusual punishment forbidden by the Eighth Amendment." *Id.* (quoting *Whitley v. Albers*, 475
 26 U.S. 312, 319 (1986)).

27 "[W]henever prison officials stand accused of using excessive physical force in violation
 28 of the [Eighth Amendment], the core judicial inquiry is...whether force was applied in a good-

1 faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm.”
 2 *Hudson v. McMillian*, 503 U.S. 1, 6-7 (1992); *see also Whitley*, 475 U.S. at 320-21; *Watts v.*
 3 *McKinney*, 394 F.3d 710, 711 (9th Cir. 2005); *Martinez v. Stanford*, 323 F.3d 1178, 1184 (9th
 4 Cir. 2003). “When prison officials maliciously and sadistically use force to cause harm,
 5 contemporary standards of decency are always violated.” *Hudson*, 503 U.S. at 9 (citing *Whitley*,
 6 475 U.S. at 327).

7 In determining whether the use of force is excessive, courts are instructed to examine
 8 “the extent of the injury suffered by an inmate[;]” “the need for application of force, the
 9 relationship between that need and the amount of force used, the threat ‘reasonably perceived by
 10 the responsible officials,’ and ‘any efforts made to temper the severity of the forceful response.’”
 11 *Hudson*, 503 U.S. at 7 (quoting *Whitley*, 475 U.S. at 321).

12 An inmate need not establish serious injury; however, the lack of serious injury is
 13 relevant to the Eighth Amendment inquiry. *See Wilkins v. Gaddy*, 130 S.Ct. 1175, 1178 (2010).
 14 “The extent of injury may also provide some indication of the amount of force applied.” *Id.*

15 That being said, not “every malevolent touch by a prison guard gives rise to a federal
 16 cause of action...The Eighth Amendment’s prohibition of ‘cruel and unusual’ punishments
 17 necessarily excludes from constitutional recognition *de minimis* uses of physical force, provided
 18 that the use of force is not of a sort ‘repugnant to the conscience of mankind.’” *Hudson*, 503 U.S.
 19 at 9-10 (quoting *Whitley*, 475 U.S. at 327); *see also Wilkins*, 130 S.Ct. 1178 (“An inmate who
 20 complains of a ‘push or shove’ that causes no discernible injury almost certainly fails to state a
 21 valid excessive force claim.” (citing *Hudson*, 503 U.S. at 9)). “Injury and force, however, are
 22 only imperfectly correlated, and it is the latter that ultimately counts. An inmate who is
 23 gratuitously beaten by guards does not lose his ability to pursue an excessive force claim merely
 24 because he has the good fortune to escape without serious injury.” *Wilkins*, 130 S.Ct. at 1178-79.
 25 If the nature of the injuries is more than *de minimis*, but still “relatively modest,” the inmate’s
 26 damages will likely be limited. *See id.* at 1180.

27 The parties have differing versions of the way events transpired on January 1, 2012.
 28 Plaintiff claims that he ran away from Nguyen, who had been assaulting him, and then he lay

1 down on the ground and was approached by Collette and the other officers, who began kneeing
2 him violently in the back, causing him severe back pain for which he eventually received pain
3 medication. Collette, on the other hand, asserts that Plaintiff was fleeing from Nguyen and
4 disregarded orders to stop, had to be chased from the tier onto the yard, and was taken to the
5 ground, and carefully placed on the medical cart.

6 The court has reviewed the video submitted manually by Defendants as Exhibit B. The
7 disc contains files referred to by Defendants as a surveillance video and a medical video.

8 The surveillance video clips appear to show the interaction between Plaintiff and Nguyen
9 on the tier from different camera views. The court observed a discussion took place between an
10 inmate (whom the court presumes is Plaintiff) and a correctional officer (whom the court
11 presumes is Nguyen). Nguyen points down the hall, places his hand on the inmate's shoulder,
12 and then the video cuts to another camera. This view shows a correctional officer standing in the
13 middle of a room with an entrance to various hallways (possibly the sally port), when the same
14 inmate and correctional officer pictured in the first camera view come running through the room.
15 This is then shown from a different camera angle in the same room. Additional camera angles
16 then show the two officers depicted in the scenes, followed by others, begin to chase the inmate
17 down a hallway, out a door, and out onto the yard. That is where the surveillance video ends.

18 The medical video file, contains a clip taken by a hand-held camera (as opposed to the
19 stationery surveillance cameras in the prior video clip) which shows Plaintiff on the ground,
20 surrounded by correctional officers. A correctional officer (presumably Nguyen) was
21 interviewed, but the audio is difficult to hear, and is largely irrelevant to the remaining claim
22 concerning Collette. The camera goes back outside to where Plaintiff is being restrained on the
23 ground, and medical was permitted to examine him outside. Plaintiff was lifted up and placed
24 against the fence for medical staff to examine him. The medical staff asked him questions, but
25 the questions and responses are difficult to decipher. The video reveals that Plaintiff's back was
26 examined, and Plaintiff indicated he had an injury to the lower back area. Plaintiff was then
27 escorted to the medical cart and was placed on the cart without incident. The medical staff
28

1 member indicated Plaintiff was going to be taken to the infirmary to have his back examined
 2 further.

3 The videos do not show Plaintiff either getting on the ground on the yard or being taken
 4 to the ground.³ Instead, the video shows the interaction with Nguyen in the surveillance video
 5 which ends with Plaintiff running outside. The medical video then commences when Plaintiff is
 6 already on the ground. This is consistent with Plaintiff 's contention that the video footage does
 7 not reflect the portion of the incident involving Collette. Plaintiff did propound a request for
 8 production asking for any and all camera footage depicting the interaction between Collette and
 9 Plaintiff from the cameras on the yard (and not the hand-held cameras), starting from the point
 10 when he got down on the ground. (ECF No. 139 at 214, Request No. 1.) Defendants responded
 11 that no such footage was located. (*Id.*, Response to Request No. 1.)

12 Therefore, the video does not contradict Plaintiff's statements about the incident, as
 13 Defendants suggest (other than the fact that he was thrown onto the medical cart), because the
 14 video apparently does not show the interaction with Collette.

15 While Defendants imply Plaintiff suffered no harm after the alleged incident, the medical
 16 records do reflect that Plaintiff complained of back pain, and while the medical report indicated
 17 there were no extraneous signs of back injury, he was nevertheless given pain medication.

18 In sum, a genuine dispute of material fact exists as to whether force was used and
 19 whether Plaintiff suffered injury as a result of the interaction between Plaintiff and Collette on
 20 January 1, 2012. Therefore, Collette's motion should be denied with respect to this claim.

21 **C. Excessive Force against Holliday**

22 Plaintiff claims that Holliday escorted him from the HDSP infirmary (following the
 23 incidents with Nguyen and Collette) to the segregation unit and ordered him to walk into the cell,
 24 and Plaintiff complied. (ECF No. 139 at 7, 67.) He states that Holliday then started punching
 25 Plaintiff in the right jaw, causing Plaintiff to fall to the floor. (ECF No. 139 at 7, 67.) He

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 27

28 ³ Incidentally, Collette's discovery responses acknowledge that when Plaintiff ran outside he lay on the
 ground before any officer reached him. (ECF No. 139 at 231.)

1 contends that he suffered a bruised and swollen face, bleeding mouth, dizziness, three loose
 2 teeth, and felt like his jaw was broken. (*Id.*)

3 According to Holliday, Plaintiff's medical records are devoid of any mention of injuries
 4 consistent with Plaintiff's claims that Holliday punched him causing severe bleeding, a broken
 5 jaw, loose teeth and swelling. (ECF No. 131 at 15.) Plaintiff submitted a medical kite the next
 6 day, on January 2, 2012, complaining only of shoulder pain, attributed to a fire that occurred in
 7 December. (*Id.*; Ex. G, ECF No. 134-4.) Ten days later, on January 12, 2012, he complained of
 8 back and neck pain due to the actions of Nguyen but failed to mention Holliday at all. (*Id.*) Nor
 9 did he mention Holliday in kites submitted on January 22 and 25, 2012. (*Id.*) He did not discuss
 10 Holliday in the grievance that discussed the events of that day. (ECF No. 131 at 16.) Finally,
 11 Holliday maintains he did not hit Plaintiff. (ECF No. 131 at 16; Ex. I, ECF No. 131-9 at 4.)

12 Plaintiff counters that the medical records do not note the facial injuries caused by
 13 Holliday because Holliday had refused to get him medical treatment. (ECF No. 139 at 8.) He
 14 claims that he reported the injuries Holliday caused him in a kite written on January 2, 2012,
 15 where he requested medical attention for the pain in his jaw, and that he grieved the issue in
 16 February after he was transferred out of HDSP. (ECF No. 139 at 7, 9, 185.)

17 Once again, a genuine dispute of material fact exists as to whether Holliday used force
 18 against Plaintiff on January 1, 2012, and whether Plaintiff suffered injuries as a result of the use
 19 of force. Plaintiff maintains that Holliday needlessly punched him in the jaw, causing injuries,
 20 while Holliday contests using force. While there are no medical records reflecting these injuries
 21 around the time the incident allegedly occurred, Plaintiff explains that this is because Holliday
 22 denied his requests for medical care that day, and he discussed the issue later on. A kite he sent
 23 to medical dated January 2, 2012, asserts that after he came from medical following the attacks
 24 by correctional officers, Holliday punched him in the jaw multiple times causing his mouth to
 25 bleed, loosened his teeth, and caused his jaw to swell. (ECF No. 139 at 185.) He requested pain
 26 medication for his jaw. (*Id.*) Defendants contest the authenticity of this kite, but that is an issue to
 27 be resolved by the fact-finder.

28

1 As a result of these disputed facts, the court recommends that the motion for summary
 2 judgment be denied with respect to this claim.

3 **D. Denial of Medical Care- Holliday**

4 A prisoner can establish an Eighth Amendment violation arising from deficient medical
 5 care if he can prove that prison officials were deliberately indifferent to a serious medical need.
 6 *Estelle v. Gamble*, 429 U.S. 97, 104 (1976). A claim for deliberate indifference involves the
 7 examination of two elements: "the seriousness of the prisoner's medical need and the nature of
 8 the defendant's response to that need." *McGuckin*, 974 F.2d at 1059; *see also Akhtar v. Mesa*,
 9 698 F.3d 1202, 1213 (9th Cir. 2012) (quoting *Jett v. Penner*, 439 F.3d 1091, 1096 (9th Cir.
 10 2006)). "A 'serious' medical need exists if the failure to treat a prisoner's condition could result in
 11 further significant injury or the 'unnecessary and wanton infliction of pain.'" *McGuckin*, 974 F.2d
 12 at 1059 (citing *Estelle*, 429 U.S. at 104); *see also Akhtar*, 698 F.3d at 1213.

13 If the medical need is "serious," the plaintiff must show that the defendant acted with
 14 deliberate indifference to that need. *Estelle*, 429 U.S. at 104; *Akhtar*, 698 F.3d at 1213 (citation
 15 omitted). "Deliberate indifference is a high legal standard." *Toguchi v. Chung*, 391 F.3d 1051,
 16 1060 (9th Cir. 2004). Deliberate indifference entails something more than medical malpractice or
 17 even gross negligence. *Id.* Inadvertence, by itself, is insufficient to establish a cause of action
 18 under section 1983. *McGuckin*, 974 F.2d at 1060. Instead, deliberate indifference is only present
 19 when a prison official "knows of and disregards an excessive risk to inmate health or safety; the
 20 official must both be aware of the facts from which the inference could be drawn that a
 21 substantial risk of serious harm exists, and he must also draw the inference." *Farmer v. Brennan*,
 22 511 U.S. 825, 837 (1994); *see also Akhtar*, 698 F.3d at 1213 (citation omitted).

23 Deliberate indifference exists when a prison official "den[ies], delay[s] or intentionally
 24 interfere[s] with medical treatment, or it may be shown by the way in which prison officials
 25 provide medical care." *Crowley v. Bannister*, 734 F.3d 967, 978 (9th Cir. 2013) (internal
 26 quotation marks and citation omitted).

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 28

1 Plaintiff contends that after Holliday hit him in the jaw, Holliday denied his request for
 2 medical care. (ECF No. 116 at 5; ECF No. 139 at 7.) He claims that Holliday said: “No! I bet
 3 you’ ass won’t file another grievance.” (*Id.*; ECF No. 139 at 67.)

4 Holliday contests that the alleged assault incident occurred; therefore, he disputes that he
 5 denied Plaintiff medical care.

6 There is another genuine dispute of material fact as to whether Holliday denied Plaintiff’s
 7 request for medical attention on January 1, 2012. While Holliday questions the authenticity of
 8 the January 2, 2012 kite because there is no date stamp, this is again an issue for the fact-finder.
 9 In any event, viewing the kite and Plaintiff’s statement under penalty of perjury that Holliday
 10 denied his request for care in the light most favorable to Plaintiff, it tends to corroborate
 11 Plaintiff’s claim that he did not receive medical care on January 1, 2012. Therefore, the motion
 12 for summary judgment should be denied as to this claim.

13 **E. Retaliation-Holliday**

14 “Section 1983 provides a cause of action for prison inmates whose constitutionally
 15 protected activity has resulted in retaliatory action by prison officials.” *Jones v. Williams*, 791
 16 F.3d 1023, 1035 (9th Cir. 2015); *Pratt v. Rowland*, 65 F.3d 802, 806 (9th Cir. 1995). Such a
 17 claim consists of five elements:

18 (1) An assertion that a state actor took some adverse action against an inmate (2)
 19 because of (3) that prisoner’s protected conduct, and that such action (4) chilled
 20 the inmate’s exercise of his First Amendment rights, and (5) the action did not
 21 reasonably advance a legitimate correctional goal.

22 *Jones*, 791 F.3d at 1035 (quoting *Rhodes v. Robinson*, 408 F.3d 559, 567-68 (9th Cir. 2005)).

23 “The First Amendment guarantees a prisoner a right to seek redress of grievances from
 24 prison authorities as well as a right of meaningful access to the courts.” *Id.* (citing *Bradley v.*
 25 *Hall*, 64 F.3d 1276, 1279 (9th Cir. 1995)).

26 Plaintiff states that Holliday threatened to kill him if he filed a grievance after Holliday
 27 had ascertained that Nguyen had attacked Plaintiff because Plaintiff tried to obtain a grievance.
 28 (ECF No. 116 at 11; ECF No. 139 at 6, 7, 67.) He states that the adverse action of assaulting and
 threatening Plaintiff was directly related to Plaintiff’s history of filing grievance and requesting a
 grievance on January 1, 2012. (ECF No. 139 at 15.) He claims this had a chilling effect on him,

1 and made him prolong filing a grievance against Holliday until he left HDSP, and that Holliday's
 2 actions were not reasonably related to any legitimate penological interest. (*Id.*) He submitted a
 3 grievance where he reported Holliday threatening to kill him on January 1, 2012, if he tried to
 4 get another grievance. (ECF No. 139 at 103-106.)

5 Holliday contends there is no evidence Holiday knew Plaintiff requested a grievance
 6 because Holliday was not at the scene when the events occurred around 3:00 p.m. on January 1,
 7 2012. (ECF NO. 131 at 15.) He asserts that Plaintiff filed his grievance at 11 p.m., after the
 8 alleged events occurred with Holliday; therefore, Holliday could not have known of his filing the
 9 grievance. (ECF No. 131 at 15; Ex. H, ECF No. 131-8 at 2.)

10 Holliday asserts that no record puts him on the scene when Plaintiff was involved in the
 11 alleged altercations with Nguyen and Collette so that he would know Plaintiff was attempting to
 12 get a grievance. (ECF No. 140 at 6.) He argues that Plaintiff offers no evidence to rebut this;
 13 however, Plaintiff does offer evidence to rebut this- his own sworn statement that Holliday was
 14 there and threatened him if he filed another grievance, and that Holliday later assaulted him and
 15 denied him medical care, and said: "No! I bet you' ass won't file another grievance." (*Id.*; ECF
 16 No. 139 at 67.)

17 Plaintiff's sworn statement is sufficient to create a genuine dispute of material fact as to
 18 whether Holliday in fact threatened Plaintiff concerning the filing of grievances. Therefore, the
 19 motion for summary judgment should be denied as to this claim.

20 **F. Denial of Medical Care- Baker, Koehn, Rivas & Conditions- Exercise & Shower and
 21 Washing with Toilet Water**

22 Plaintiff claims, as he did in consolidated case 3:14-cv-00213-RCJ-WGC, that Baker, Dr.
 23 Koehn, and Dr. Rivas denied him medical care when they denied him a cane. He further avers
 24 that not having a cane has precluded him from exercising or taking a shower, such that he had to
 25 use toilet water to wash up.

26 The court has addressed these claims in detail, first in connection with Plaintiff's motion
 27 for preliminary injunction (Report & Recommendation at ECF No. 89, adopted by District Judge
 28

1 Du in ECF No. 94), and then in connection with the parties' motion for summary judgment in
2 3:14-cv-00213-RCJ-WGC (Report and Recommendation at ECF No. 138).

3 In connection with the motion for preliminary injunction, the court reviewed all of the
4 relevant medical evidence, and held a hearing where testimony was given by Plaintiff and
5 Dr. Koehn. (ECF No. 89.) At that time, it was proposed that Plaintiff be referred to an outside
6 orthopedic specialist to render an opinion regarding Plaintiff's complaints of back and knee pain,
7 and whether he required the use of a cane or wheelchair. (*Id.*) Plaintiff was examined by Dr.
8 Joseph Walls, an orthopedic specialist employed by Tahoe Fracture and Orthopedic Medical
9 Clinic in Carson City, Nevada, on September 3, 2014. (ECF No. 89, citing ECF No. 71-1.)
10 Dr. Walls opined that Plaintiff's subjective complaints of back and knee pain were unsupported
11 by any objective finding, and that the best course of treatment was for Plaintiff to take ibuprofen
12 as needed for pain, but that he did not need a cane or wheelchair. (*Id.*) In the end, the
13 undersigned concluded, and District Judge Du adopted the conclusion, that Plaintiff did not
14 demonstrate a likelihood of success on the merits of his claim that his physicians were
15 deliberately indifferent to his serious medical needs when they denied his requests for a cane.
16 (ECF No. 89 at 13-14.) The court summarized Plaintiff's relevant medical records in detail,
17 including the most recent records submitted by Plaintiff. (*Id.* at 14-16.) The court found that
18 while Plaintiff disagreed with the course of treatment, and felt he should be provided with a cane
19 or wheelchair, there was no evidence that the course of treatment undertaken by Defendants was
20 medically unacceptable or chosen in conscious disregard of an excessive risk to Plaintiff's
21 health. (*Id.* at 16.)

22 The court confronted the issue again when the parties filed their motions for summary
23 judgment in 3:14-cv-00213-RCJ-WGC. The court again reviewed the relevant medical evidence,
24 and found again that Plaintiff presented a difference of opinion concerning the treatment
25 provided, *i.e.*, whether or not he should be issued a cane. (ECF No. 138 at 19-20.) The court
26 confirmed that it could not find the decision to deny Plaintiff a cane was medically unacceptable
27 under the circumstances when every single physician (including Dr. Koehn, Dr. Rivas, Dr.
28 Walls, and Dr. Mar) to evaluate Plaintiff reached the same conclusion—that a cane was not

1 medically indicated. (*Id.*) Plaintiff argued then, as he does now, that Dr. Walls was hand-picked
 2 by Dr. Koehn to examine Plaintiff and was biased against him, but that statement is unsupported
 3 by any evidence and ignores Dr. Wall's declaration that prior to the examination he was not
 4 contacted by any NDOC physician or staff other than to schedule the appointment. (*Id.* at 20.)
 5 Plaintiff did not file an objection to the report and recommendation, and it remains pending
 6 before District Judge Du.

7 “*The law of the case doctrine, a judicial invention, aims to promote the efficient*
 8 *operation of the courts.*” *Hall v. City of Los Angeles*, 697 F.3d 1059, 1067 (9th Cir. 2012)
 9 (citation omitted). “It generally precludes a court from reconsidering an issue decided previously
 10 by the same court or by a higher court in the identical case. The issue in question must have been
 11 decided explicitly or by necessary implication in the previous disposition.” *Id.* (citation omitted).
 12 “Application of the law of the case is discretionary.” *United States v. Jones*, 532 Fed.Appx. 769,
 13 772 (9th Cir. 2013) (citing *Hall*, 697 F.3d at 1067 (9th Cir. 2012)). It also applies to interlocutory
 14 orders that are not immediately appealable. *See United States v. Real Property Located at Incline*
 15 *Village*, 976 F.Supp. 1327 (D. Nev. 1997).

16 The court exercises its discretion to apply the law of the case doctrine to these remaining
 17 claims. The court explicitly addressed Plaintiff's Eighth Amendment claim concerning the denial
 18 of a cane in 3:14-cv-00213-RCJ-WGC, which has been consolidated with this case. The claim
 19 that these defendants denied Plaintiff's Eighth Amendment rights because he was unable to
 20 shower or exercise as a result of their denial of a cane was implicitly decided in light of the
 21 previous disposition. The conclusion was that all of Plaintiff's health care providers to examine
 22 him determined that a cane was not medically necessary; therefore, they were not deliberately
 23 indifferent in denying him a cane.

24 As such, the court recommends that Defendants' motion for summary judgment be
 25 granted as to these claims.

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IV. RECOMMENDATION

IT IS HEREBY RECOMMENDED that the District Judge enter an order that:

(1) Defendants Osbun and Hageman a be **DISMISSED WITHOUT PREJUDICE** pursuant to Federal Rule of Civil Procedure 4(m);

(2) Defendant Sevier be **DISMISSED WITH PREJUDICE** pursuant to Federal Rule of Civil Procedure 25(a)(1);

(3) Defendant Evander Rivas be **DISMISSED WITH PREJUDICE**, as he is not the correct defendant;

(4) The Eighth Amendment claim that Neven and Morrow exacerbated Plaintiff's mental health condition be **DISMISSED WITH PREJUDICE**;

(5) The Eighth Amendment claim that Baker, Byrne, Neven, Nash and Baca refused Plaintiff's request to be sent to another prison should be **DISMISSED WITH PREJUDICE**;

(6) Defendants Baker, Nash, Carpenter, Neven, Baca, Cox and Morrow be **GRANTED** summary judgment as to Plaintiff's Eighth Amendment claim based on the allegation that they denied his requests for one-on-one counseling sessions;

(7) Defendants' motion be **DENIED** as to the Eighth Amendment excessive force claim against Collette;

(8) Defendants' motion be **DENIED** as to the Eighth Amendment excessive force claim against Holliday;

(9) Defendants' motion be **DENIED** as to the Eighth Amendment deliberate indifference to serious medical need claim against Holliday;

(10) Defendants' motion be **DENIED** as to the retaliation claim against Holliday;

(11) Defendants' motion be **GRANTED** as to the Eighth Amendment deliberate indifference to serious medical needs and conditions of confinement claims against Baker, Dr. Koehn and Dr. Rivas;

(12) Defendants' motion be **GRANTED** as to the supervisory liability claims against Nash, Baca, Neven, Keast, Cox and Carpenter.

In sum, the court is recommending that this action proceed with respect to the following claims and defendants only: (1) the Eighth Amendment excessive force claim against Collette; (2) the Eighth Amendment excessive force claim against Holliday; (3) the Eighth Amendment deliberate indifference to serious medical need claim against Holliday; and (4) the retaliation claim against Holliday.

The parties should be aware of the following:

7 1. That they may file, pursuant to 28 U.S.C. § 636(b)(1)(C), specific written objections to
8 this Report and Recommendation within fourteen days of receipt. These objections should be
9 titled "Objections to Magistrate Judge's Report and Recommendation" and should be
10 accompanied by points and authorities for consideration by the district judge.

11 2. That this Report and Recommendation is not an appealable order and that any notice of
12 appeal pursuant to Rule 4(a)(1) of the Federal Rules of Appellate Procedure should not be filed
13 until entry of judgment by the district court.

14 DATED: July 18, 2016.

Walter J. Cobb

**WILLIAM G. COBB
UNITED STATES MAGISTRATE JUDGE**